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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of)

Amendment of Parts 1, 21 and 74 to)

Enable Multipoint Distribution)

Service and Instructional)

Television Fixed Service Licensees)

To Engage in Fixed Two-Way)

Transmissions)

MM Docket No. 97-217

File No. RM-9060

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OFFICE OF THE SECRETARY

COMMENTS OF BELL SOUTH CORPORATION
BELL SOUTH WIRELESS CABLE, INC.

BELL SOUTH CORPORATION
BELL SOUTH WIRELESS CABLE, INC.

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Summary

The Commission proposes to enhance MDS and ITFS through the use of two-way audio, video and data communications, a goal which BellSouth fully supports. However, in considering whether technical changes require corresponding revisions of ITFS programming requirements, the Commission seems to assume that the interests of wireless cable operators can be advanced only at the expense of ITFS lessors, and vice versa. That assumption is wrong.

I. ITFS Programming Requirements

The wireless cable operator and ITFS licensee necessarily have an interdependent, symbiotic relationship. The FCC itself has recognized that the growth and development of ITFS is attributable primarily to the financial backing and technical support provided by wireless cable operators. In turn, wireless cable operators must have access to a sufficient amount of ITFS excess channel capacity and the cooperation of their ITFS lessors to develop their systems. The imposition of additional regulation will result in inefficiency and loss of value requiring both licensees and operators to divert time, energy and resources from other, more compelling needs. This works to the detriment both of ITFS licensees and operators and would act as a disincentive to utilize digital technology and other technological advancements.

A. There Is No Direct Correlation Between Technological Advancements And The Need For ITFS Programming.

The Commission asks whether use of digital technology compels an increase in ITFS minimum programming requirements. This question assumes a nexus between technological advancements and programming needs that has been soundly rejected by the FCC. The Commission time and again has recognized that applying additional regulatory restrictions to the development and

utilization of advanced technologies stifles innovation and works against maximizing the benefits that flow from the use of such technologies.

B. The Current Minimum and Ready Recapture ITFS Programming Requirements Need Not Be Increased or Otherwise Modified.

The current 40 hour per channel per week ITFS programming standard is not an absolute ceiling. ITFS licensees can and do secure the right to additional airtime where their needs so dictate.

Airtime is just one of many benefits that can flow from a channel lease arrangement. The current rules afford both ITFS licensees and wireless cable operators necessary flexibility to achieve other benefits. This flexibility will be even more important as systems convert to digital and two-way operations in an increasingly competitive and dynamic environment. The optimal balance of benefits must be left to the determination of ITFS licensees rather than to the Commission.

C. The FCC Should Clarify The ITFS Recapture Requirements

The FCC takes the position that the 20 hour recapture requirement is absolute. To read the rule as the FCC suggests leads to an absurd result, as ITFS licensees could continue to recapture airtime until all of the excess capacity initially made available over their channels was dedicated to educational uses, presumably with no financial or operational detriment. Such an interpretation would wreak havoc on many existing excess capacity lease agreements, and on the related business plans of operators. It also finds no support in past Commission decisions on this matter. The FCC should make clear that ITFS programming requirements constitute a total of 40 hours per channel per week, including both actual and recapture time.

D. Program Shifting, Channel Swapping And Channel Loading Are Essential To The Development Of New Services.

BellSouth supports the Commission's proposal to allow licensees to shift programming from their authorized channels to other MDS and/or ITFS channels in a wireless cable system, to swap channels for other channels within a system, and to load all ITFS programming on a single spectrum channel. Program shifting and loading and channel swapping would afford operators and licensees much needed flexibility to design their systems so as to best meet their individualized needs while preserving the educational use requirements in the current rules. However, it is essential that the Commission make clear that program shifting will not constitute a basis for a license renewal challenge.

II. Existing Channel Leases Must Be Grandfathered.

The Commission's proposal to require that all existing channel leases be amended to reflect any rule changes adopted in this proceeding is contrary to precedent. It would also unfairly and unnecessarily disrupt existing business relationships and operations and deprive the parties of their carefully negotiated benefits of those agreements.

III. The Ten Year Term Limit On ITFS Channel Leases Should Be Eliminated.

Historically, the Commission has gradually relaxed its ITFS lease term limitations, and elimination of the current ten year term limit on ITFS leases is now a practical necessity. Conversion to digital technology represents a multimillion dollar investment in each market by the wireless cable industry. Operators will be unable to justify the enormous expense, and few lenders will be able to finance it, without the assurance of long-term access to the additional channel capacity made possible by the conversion to digital.

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**COMMENTS OF BELL SOUTH CORPORATION
BELL SOUTH WIRELESS CABLE, INC.**

BellSouth Corporation and BellSouth Wireless Cable, Inc. (collectively, "BellSouth"), by their attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby submit the following comments in response to the above-referenced Notice of Proposed Rulemaking (the "NPRM"). The NPRM seeks comment on a series of proposed rule changes designed to enhance the ability of Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") licensees and wireless cable system operators to provide two-way communications services.¹ It is vital that any rules to be adopted by the Commission pursuant to this proceeding work to the maximum benefit of all parties concerned: ITFS/MDS licensees, wireless cable operators and subscribers. BellSouth believes that this goal can best be achieved within the framework of the current rules, with certain refinements discussed below.

¹ Wireless cable operators utilize up to 20 ITFS channels licensed to non-profit educational organizations and accredited educational institutions and 13 MDS channels to provide wireless cable service. The NPRM was initiated at the request of over one hundred participants in the wireless cable industry, including the Wireless Cable Association International, Inc., wireless cable system operators, MDS and ITFS licensees, and others (collectively, "Petitioners").

Introduction

BellSouth Corporation, through its subsidiaries, provides telecommunications, wireless communications, video programming, directory advertising and publishing, Internet access and information services to more than 27 million customers in 20 countries worldwide. In the United States, BellSouth now offers video service in multiple markets in the Southeast reaching more than 400,000 homes. In 1998, BellSouth plans to begin offering its home entertainment services over additional wireless cable systems in Atlanta, Orlando, Jacksonville, Daytona Beach, Miami and other areas of Florida and Kentucky.

BellSouth recently launched state-of-the-art digital wireless cable service in New Orleans. This system offers customers 130 channels of video programming with superior picture and sound quality, including local broadcast stations, national programming networks, premium movie channels, movies-on-command and instructional programming provided by five ITFS licensees that lease excess airtime capacity to BellSouth.

BellSouth's interest in wireless cable is part of its strategic plan to expand its involvement in the home entertainment services industry and, to that end, it is evaluating three principal service delivery platforms: wireless cable, cable television and satellite-based systems. BellSouth also is in the process of real-world testing of new video technologies and ancillary services such as high-speed data services for personal computer users. Based on cost and other competitive factors, BellSouth ultimately will choose the best delivery platform(s) in a given market. Wireless cable is an attractive option because it allows for relatively quick market entry at lower capital cost than wired systems. For wireless cable to remain a viable option for BellSouth, the rules adopted in this proceeding must work to the maximum benefit of all parties involved, and not undermine the near-term potential of

wireless cable to offer meaningful competition.

Discussion

I. ITFS Programming Requirements

In discussing ITFS programming requirements in the NPRM, the Commission states that the current ITFS programming rules seek to balance the primary educational purpose of ITFS with the need of wireless operators to maximize the amount of spectrum available for leasing. NPRM at ¶66. Unfortunately, far too often this balancing of interests is viewed as a zero-sum game, where the interests of the wireless cable operator can be advanced only at the expense of its ITFS-lessors and *vice versa*. This simply is not the case, and certainly should not serve as the starting premise in determining whether new and/or revised programming rules are necessary.

ITFS channels account for 20 of the 33 channels potentially available to wireless cable system operators for programming and other services. Wireless cable operators such as BellSouth must have access to a sufficient amount of ITFS excess channel capacity and the cooperation of their ITFS-lessors to develop their systems. By the same token, the growth and development of ITFS since the leasing of excess capacity was first authorized has been attributable in large measure to the financial backing and technical support provided by wireless cable operators, the continuation of which is directly linked to the degree of competitive success of wireless cable operators in the commercial marketplace. The Commission itself has acknowledged this on a number of occasions.²

² See, e.g., Amendment of Part 74 of the Commission's Rules Governing Use of the Frequencies in the Instructional Television Fixed Service, Report and Order, 9 FCC Rcd 3360, 3364 (1994) ("ITFS Channel Loading Order") (wireless cable strengthens ITFS significantly by providing a source of funds to promote the educational purposes of ITFS even if educational programming is not transmitted on all ITFS channels).

In recognition of this necessarily interdependent, symbiotic relationship, and the fact that both educators and operators function in a dynamic environment, the FCC historically has set its minimum programming requirements at a level that affords ITFS licensees and wireless operators maximum freedom and flexibility to tailor their contractual relationship to best meet their specific needs and interests, needs and interests that are unique to each market and that the FCC cannot possibly anticipate.

BellSouth strongly believes that this approach remains the only viable one, that the current ITFS programming rules have achieved the intended results, and if carried forward into the future will continue to serve the interests of both educators and operators in a digital environment.

A. There Is No Direct Correlation Between Technological Advancements And The Need For ITFS Programming.

Under Section 74.931(e), an ITFS licensee that leases excess capacity to a wireless operator must provide at least 20 hours of ITFS programming per channel per week, with an additional 20 hours per channel per week reserved for recapture by the licensee, for a total of 40 hours per channel per week airtime reservation. The central programming issue raised in the NPRM is whether the use of digital technology justifies an increase in mandated levels of actual and/or “ready recapture” time. NPRM at ¶ 68. This question presupposes a nexus between technological advancements and programming needs that does not exist, and previously has been rejected by the Commission.

The FCC first considered this issue in the context of wireless cable operations in General Electric Co., 61 RR 2d 146 (1986) (“Combant II”). General Electric Co. sought a declaratory ruling that ITFS licensees using Combant technology to deliver two separate video signals on a single 6 MHz channel should not be required to increase ITFS programming commensurate with the doubling

of programming capacity. The FCC granted the request, stating that:

[T]he Comband system creates the potential for a significant increase in programming capacity with no increase in required bandwidth. We believe the maximum use and development of such capacity in an environment unburdened by regulation is to be encouraged. For this reason, licensees utilizing the Comband system will not be required to provide additional ITFS programming for each path created.

Id. at 147. Central to this finding was the recognition that there is no direct link between increased capacity and the need for additional programming time, and that applying additional regulatory restrictions to the development and utilization of advanced technologies would work against maximizing the public benefits that flow from the use of such spectrum.³

The rationale of Comband II applies with even greater force today. While Comband technology represented the potential for increased programming capacity, digital and digital two-way technology creates the potential not only for an even greater increase in such capacity, but also in the types and quality of services that can be provided over that additional capacity. This permits both the licensee and the operator to maximize use and development of this capacity to a degree unimaginable at the time of the Comband II decision. This is essential, since the environment in which ITFS licensees and wireless operators function today is significantly more competitive and dynamic

³ The FCC took this same hands-off approach earlier this year when it declined to require broadcasters to provide a minimum amount of high definition television programming after they convert to digital transmission, despite the fact that such conversion allows for a sixfold increase in channel capacity, thereby enabling broadcasters to deliver other types of services in addition to video programming. See, Advanced Television Systems and Their Impact Upon Existing Television Broadcast Service, Fifth Report and Order, MM Docket No. 87-268, 12 FCC Rcd 12809 (1997). While the FCC deemed the provision of high definition television to be in the public interest, it decided to “leave to the discretion of the licensees” how much programming should be broadcast. Id. The Commission concluded that imposing minimum requirements “stifles innovation” and “involves the government in a decision that should properly be based on marketplace demand.” Id. at 12826.

than the one they confronted in 1986 when Comband II was decided. ITFS licensees today are faced with the daunting task of harnessing fast-changing technology to further their educational mission. Wireless cable operators are faced with the equally daunting task of competing in a marketplace that in addition to the entrenched hard-wire cable monopoly, is now populated with DBS and other satellite operators, private cable operators, local exchange carriers and the like, with new services such as LMDS looming on the horizon. Many of these competitors are already offering precisely the broad array of advanced services for which the wireless cable industry seeks authority in this proceeding. For the most part, these competitors also enjoy the added advantage of being subject to far fewer regulatory obstacles than ITFS/MDS licensees and wireless cable operators under the current rules.⁴

Today more than ever, enhancing the competitive viability of wireless cable service by maximizing flexibility and service offerings will promote the underlying educational purpose of ITFS,

⁴ The watchwords of the FCC licensing process today are freedom and flexibility. For example, in adopting new rules for Personal Communications Services, the Commission specifically acknowledged that the regulatory impact on present and future technologies should be minimized wherever possible in order to provide maximum flexibility for technological innovation. Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Memorandum Opinion and Order, 76 RR 2d 577, 593 (1994). In authorizing LMDS, the Commission recognized that licensees are in the best position to analyze business plans, access new technology, and determine customer demand. Rulemaking to Amend Parts 1, 2, 21 and 25 of the Commission's Rules to Redesignate the 275-29.5 GHz Frequency Band, to Reallocate the 29.5-30.00 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Service, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, 6 CR 1291, 1330 (1997). Thus, one of the Commission's stated goals in the LMDS proceeding was to maintain an open and flexible approach to regulation that would allow the judgements of individual licensees to shape the nature and components of the services offered. Id. at 1348. This approach was seen not only as a practical necessity, but as required under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which directs the Commission to promote competition in the telecommunications marketplace by, *inter alia*, removing barriers to entry and encouraging technological developments. Id. at 1345.

as the FCC itself recognizes. NPRM at ¶ 64. The focus must be on eliminating regulatory hurdles and maximizing developmental flexibility, not imposing additional regulatory hurdles such as increased programming obligations.

B. The Current Minimum and Ready Recapture ITFS Programming Requirements Need Not Be Increased or Otherwise Modified.

It is critical to bear in mind that the current 40 hour per channel per week standard is not an absolute ceiling. ITFS licensees can, and do, secure the rights to additional airtime where their needs so dictate. BellSouth has entered into channel lease agreements with various ITFS licensees providing for ITFS airtime usage in excess of the FCC's mandated minimum ITFS programming requirements. However, the current rules recognize, at least implicitly, that airtime is but one of many benefits that can flow from a channel lease arrangement, and afford both ITFS licensees and wireless operators necessary flexibility to achieve these other benefits. Examples of such benefits include but are by no means limited to the following:

- increased compensation, in the form of up-front payments and/or higher monthly fees
- construction of additional receive sites, booster stations, repeaters, etc.
- furnishing of special equipment
- assistance in developing and/or securing specific educational programming
- assistance with the utilization and deployment of high speed data and other advanced services
- assistance with the development and implementation of area-wide and/or regional educational networks

The ITFS licensee and wireless operator, not the FCC, are in a position to judge the relative worth of such benefits as compared to additional airtime rights. In BellSouth's experience,

maximization of ITFS airtime usage is seldom, if ever, the focal point of lease negotiations. Indeed, few ITFS licensees are able to meet even the present minimum programming requirements in a meaningful way without assistance from the wireless cable operator, much less utilize their recapture rights. If, in practice, the current 40 hour standard has been more than sufficient to meet the actual and anticipated programming needs of ITFS licensees, and digital deployment will not by itself generate a need for more programming, then there is no logical basis to impose additional programming requirements on ITFS licensees.

The FCC casts the issue as whether an increase in the ITFS programming requirements would “burden” ITFS licensees, or would help them in their negotiations with wireless cable operators. NPRM at ¶ 68. Again, this is not an “us” versus “them” proposition. The imposition of increased programming obligations will require both ITFS licensees and operators to divert time, energy and resources from other, perhaps more compelling needs. The math is simple and straightforward: if more capital must be devoted to satisfying regulatory requirements, less will be available to meet the special equipment, technology, networking etc., needs of educators, and to allow wireless operators to maximize their competitive potential in the marketplace. This will negatively affect not only the range of benefits available to ITFS licensees, but also the revenue stream they will receive over time. It could also serve as a disincentive to utilize digital technology, as educators will be loath to divert already tight resources to increased programming and associated equipment costs and related teacher and staff training. Wireless operators will find it even more difficult to justify the enormous investment represented by the conversion to digital technology.

Minimum programming requirements represent an undesirable one-size-fits-all approach to regulation. The inherent flaw in this approach is that, because no two licensees or wireless operators

are in the same position, and the marketplace is evolving rapidly, such broad-brush standards will actually work to the detriment of a number of licensees and operators. The unintended consequence of increasing the mandated programming requirements is that it will only serve to increase the number of negatively affected licensees and operators, perhaps significantly. The optimal balance of benefits is best left to the determination of ITFS licensees and wireless cable operators, not the Commission.

The Commission should not increase the current minimum or recapture ITFS programming requirements absent clear and compelling support. Such support is woefully lacking. Indeed, there is no link between technological advancements and the need for additional airtime. The current 40 hour standard has served both educators and operators well. The flexibility embodied in the 40 hour standard will be even more important as systems convert to digital and two-way operations in an increasingly competitive environment, and ITFS licensees always remain free to bargain for additional airtime when their needs and interests so require. BellSouth submits that there is absolutely no basis to impose additional programming obligations.

C. The FCC Should Clarify The ITFS Recapture Requirements.

As noted previously, under Section 74.931(e), ITFS licensees that lease capacity to wireless cable system operators must provide at least 20 hours of ITFS programming per week on each of their 6 MHz ITFS analog channels, with an additional 20 hours per channel per week reserved for recapture by the licensee, for a total of 40 hours per analog channel per week. In the NPRM, the FCC takes the position that the 20 hour recapture requirement is absolute. In other words, ITFS licensees are entitled to a flat 20 hours per channel per week of recapture time regardless of the amount of time actually used by the ITFS licensee.

To read the rule as the NPRM suggests leads to an absurd result. Read literally, an ITFS

licensee always has the right to recapture an additional 20 hours, regardless of how many hours of programming it already delivers. This could continue until all of the excess capacity initially made available over its channels was recaptured, presumably with no financial or operational detriment.

Interpreting the rule in this manner would wreak havoc on many existing excess capacity lease agreements. These agreements are based on the premise that wireless cable operators will have use of a set minimum amount of analog channel capacity, typically all but 40 hours per channel per week. If the 40 hour standard is illusory, then so are the many business plans upon which it is based.

This interpretation of the recapture requirement also defies common sense. The FCC itself acknowledged that, when it first imposed a recapture requirement, it did so within the framework of the overall 40 hour per channel per week airtime reservation such that the actual amount of airtime subject to recapture could be less than 20 hours per channel per week, provided the primary and recapture time together satisfied the 40 hour standard. NPRM at ¶ 66. Contrary to the assertions in the NPRM, the Commission in the Wireless Cable Reconsideration Order⁵ did not abandon this approach in favor of an “absolute” 20 hour recapture requirement. The Wireless Cable Reconsideration Order, like prior decisions on this matter, specifically acknowledged the 40 hour per channel per week standard. The FCC should take this opportunity to revise Section 74.931 to more clearly reflect that ITFS programming requirements constitute a total of 40 hours per channel per week, including both actual and recapture time.

⁵ See Amendment of Parts 21, 74, 78 and 94 of the Commission’s Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, & Cable Television Relay Service, Order on Reconsideration, 6 FCC Rcd 6764, 6773-74 (1991) (“Wireless Cable Reconsideration Order”).

D. Program Shifting, Channel Swapping And Channel Loading Are Essential To The Development Of New Services.

The NPRM outlines a series of initiatives that would allow licensees to shift programming from their authorized channels to other MDS and/or ITFS channels in a wireless cable system, to swap channels for other channels within a system, and to load all ITFS programming on a single channel. BellSouth agrees with the Commission that it is most practicable to view a licensee's group of four ITFS channels (or MDS channel groups for that matter) as an "integral constituent of a market-wide set of channels." NPRM at ¶ 71. Consistent with this approach, BellSouth supports program shifting as well as channel loading and swapping, so long as they are voluntary.

The FCC properly recognizes that the additional programming flexibility embodied in program shifting will be essential since, under the proposed rules, system developers may need to utilize contiguous 6 MHz channels for return paths in order to minimize the amount of spectrum that would be lost to the proposed spectral mask whenever a return path is adjacent to a downlink channel. NPRM at ¶ 70. Moreover, depending on channel availability and system design, entire ITFS channel groups may need to be devoted to return paths. Id.

The Commission should also recognize that allowing licensees to shift programming to other channels offers considerable benefits to MDS/ITFS licensees and wireless operators even when two-way services are not in the offing. For example, the sharing of digital headend equipment by closely-spaced co-channel stations in adjacent markets can substantially reduce the costs to convert to digital. However, such equipment sharing is not practical from an operational standpoint unless the Commission allows licensees to shift programming.

The Commission must make clear that program shifting will not constitute a basis for a license renewal challenge. In Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Stations, Report and Order, 3 CR 1385, 1424-5 (1996), the FCC allowed broadcast licensees to meet their children's programming requirements by sponsoring programming on other stations in the market. If broadcasters can meet programming requirements through this type of program shifting, ITFS licensees should also be entitled to use such shifting to fulfill their programming requirements.

So long as it is voluntary, both ITFS and MDS licensees also should be free to exchange channels within a system. Current rules regarding the procedure for assignment of licenses should govern such swaps. As with channel shifting, channel swapping would afford operators and licensees much needed flexibility to design their systems so as to best meet their individualized needs, while preserving the educational use requirements in the current rules.

II. Existing Channel Leases Must Be Grandfathered.

The NPRM invites comment on a proposal to require that all existing channel leases be amended to reflect any rule changes adopted in this proceeding. Not only is such a requirement unduly burdensome, unnecessary and contrary to precedent but it would also unfairly and unnecessarily disrupt existing business relationships and operations and deprive parties of their carefully negotiated benefits of lease agreements.

Requiring the review and amendment of all existing channel leases would impose an enormous burden on licensees and wireless cable operators. Indeed, this would require some of the larger, multi-system operators to review and amend literally hundreds of leases. The burdens on licensees would be proportionately as great. The resources devoted to this undertaking, which is certain to

take many months if not longer to complete, are resources that will not be available for the implementation of digital operations and the roll-out of enhanced services. Such a result runs contrary to the very purpose and intent of the Commission's actions in this proceeding.

The Commission must recognize that existing channel leases have been negotiated to maximize the benefits to each party. How this is best accomplished varies greatly depending on the particular circumstances of the parties and the market in question. Because of the unlimited number of variables, it is the parties themselves and not the Commission that are in the best position to determine whether proposed system changes warrant contract revisions.

The FCC must also be cognizant of the fact that the current business plans of most wireless operators depend in large measure on the terms of existing channel leases. If the FCC mandates the review and amendment of these leases, then these business plans and the multi-million dollar investments that have already been made based on these plans could be called into question. Obviously, the repercussions could be dramatic.⁶

In the ITFS Channel Loading Order, the FCC determined that it should grandfather then-existing leases providing for the use of "channel mapping" techniques. This action was based on the recognition that such leases "had been negotiated in good faith under the former rules," and there was no need to compel the parties to modify their agreements at that time. 9 FCC Rcd at 3366.

⁶ In addition to these compelling practical considerations, mandating the amendment of all existing leases raises serious legal issues. It is axiomatic that the Commission cannot engage in retroactive rulemaking unless it has a statutory directive to do so. Bowen & Georgetown University Hospital, 488 U.S. 204, 208, 109 S.Ct 468, 471-72 (1988). This directive must be explicit; a general grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. Id. The FCC's only authority for promulgating the two-way regulations is its general rulemaking authority provided in the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq. The APA does not authorize retroactive application of rules.

Instead, the Commission required parties to incorporate the new channel loading rules when they negotiated lease renewals. There is no reason why the same approach should not be taken in this proceeding.

III. The Ten Year Term Limit On ITFS Channel Leases Should Be Eliminated.

The FCC seeks comment on whether regulations governing the maximum length of ITFS channel leases should be modified. NPRM at ¶ 87. Historically, the Commission has gradually relaxed its ITFS lease term limitations. Eliminating the current ten year term limit on leases is now a practical necessity. Originally, ITFS leases could not extend beyond the term of the underlying license. As a result, wireless operators often were forced to accept short term leases that did not offer the long-term stability required to justify the necessary investment by the operator, and typically demanded by the investment community. In recognition of this problem, the Commission in 1995 amended its rules to permit ITFS airtime leases to extend for up to ten years, regardless of the term of the underlying license. Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, Report and Order, 77 RR2d 213, 222 (1995). Central to the Commission's action was the recognition that the uncertainty created by the then-existing rule made it difficult for operators to justify significant system investments, deterred potential financiers from investing in the industry, and hampered operators in their attempts to bring new investors into the industry. Id. at 222.

This same rationale now supports the elimination of lease term limits. The Commission must recognize that the conversion to digital represents a multi-million dollar investment by the wireless cable industry, an investment that dwarfs that required for analog operations. Operators will be unable to justify the enormous expense, and few lenders will be willing to underwrite it, without

assurances of long-term access to the additional channel capacity that is the direct and intended result of these expenditures. For many operators, it will be difficult if not impossible to make the numbers work and attract the necessary funding within a ten year time frame.

In adopting the current ten year limit, the FCC acknowledged that the existence of a long term lease in no way affects the duration of the underlying license or the licensee's future use of the frequency, but does greatly help the operator in justifying its own investment, securing funding, etc. Id. This being so, nothing is gained by preventing an ITFS licensee and its operator-lessee from agreeing to a longer lease term, when it is deemed to be in their mutual best interests.

Conclusion

The significant technological and related service advancements represented by the proposals in the NPRM will never be fully realized if ITFS licensees and wireless cable operators are required to divert significant time, effort and resources to regulatory compliance. Increasing minimum programming obligations, subjecting existing ITFS leases to yet another round of regulatory review, and maintaining artificial and entirely antiquated restrictions on ITFS lease terms run directly counter to the licensing philosophy expounded today by the FCC. That philosophy, which recognizes that the judgements of individual licensees should shape the nature and components of the services offered, has already been implemented for a host of other services, a number of which will be direct competitors of wireless cable. When it comes to harnessing new technologies and translating technological advancements into viable and robust services, ITFS licensees and wireless cable operators have no less need for freedom and flexibility than do others in the marketplace.

This proceeding presents the FCC with a unique opportunity to ease the regulatory hurdles facing ITFS licensees and wireless cable operators and thereby conform its regulation of this service with

its overall licensing policies. It is imperative that the Commission take full advantage of this opportunity.

Respectfully submitted,

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January 8, 1998

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CERTIFICATE OF SERVICE

I, Victor Onyeoziri, do hereby certify that I have this 8th day of January, 1998 caused to be delivered by hand the foregoing "Comments" of BellSouth Corporation and BellSouth Wireless Cable, Inc. to the following:

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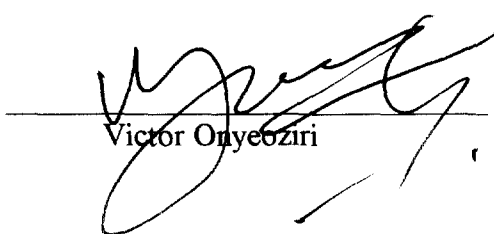
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